

**United States Department of Labor
Employees' Compensation Appeals Board**

J.A., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Miami, FL, Employer**

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**Docket No. 20-1595
Issued: April 21, 2021**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 9, 2020 appellant filed a timely appeal from an April 15, 2020 nonmerit decision Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 20, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 15, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 21, 2018 appellant, then a 56-year-old airway transportation systems specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date he bumped his head on his sun visor when accidentally damaging the passenger side of his work vehicle while in the performance of duty. In an accompanying statement, he explained that the motor vehicle collision occurred when he was reaching for a sports drink and accidentally turned to the right, damaging the passenger side of his work vehicle. Appellant stopped work in the morning on August 21, 2018 and returned to work in the afternoon of the same date.

Appellant submitted emergency department discharge notes dated August 21, 2018.

In a development letter dated August 28, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received a September 23, 2018 note from Dr. Serena Sara, a chiropractor, who noted that appellant was involved in a motor vehicle accident on August 21, 2018. Dr. Sara noted that x-rays were taken of his cervical and lumbar spine and showed subluxation at the occiput, C1 levels, C7, C5, L3, L1, L2, and L5 levels. She diagnosed segmental and somatic dysfunction of cervical region, neck strain, segmental and somatic dysfunction of thoracic region, thoracic strain, segmental and somatic dysfunction of lumbar region, lumbar strain, acute post-traumatic headache, right shoulder pain, right knee pain, left knee pain, and segmental and somatic dysfunction of pelvic region. Dr. Sara opined that appellant's conditions and treatment were causally related to the claimed employment incident.

By decision dated October 1, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted August 21, 2018 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On October 16, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In support of his request, appellant submitted a September 27, 2018 note from Dr. Rafael Ubeda, a Board-certified family practitioner, who noted that appellant had suffered an emergency medical condition as a result of the August 21, 2018 employment incident.

By decision dated March 20, 2019, an OWCP hearing representative affirmed the October 1, 2018 decision.

By letter dated March 18, 2020, received by OWCP on March 24, 2020, appellant requested reconsideration.

Appellant submitted a magnetic resonance imaging (MRI) scan report of his cervical spine, dated August 15, 2019, which revealed spondylitic and congenital multilevel mild cord compression and C3 vertebral lesion. An MRI scan report of appellant's right knee, dated August 19, 2019, revealed stable meniscal chondrocalcinosis, osteoarthritis changes, high-grade medial joint compartment chondromalacia, small suprapatellar effusion, significant degenerative changes of the anterior cruciate ligament (ACL), and chronic posterior cruciate ligament (PCL) sprain. An MRI scan report of his right shoulder, dated November 6, 2019, revealed focal partial thickness tear at the proximal long head of the biceps tendon, significant tendinosis of the distal supraspinatus tendon extending into the infraspinatus tendon, and degenerative changes of the superior labrum. An MRI scan report of appellant's lumbosacral spine, dated November 19, 2019, revealed mild-to-moderate degenerative changes in the L2 inferior endplate and mild narrowing of the L5-S1 intervertebral disc space.

In a letter dated February 13, 2020, the Department of Veterans Affairs indicated that appellant was separated from military service under honorable conditions and was entitled to compensation for service-connected disability rated at 30 percent or more.³

By decision dated April 15, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit

³ Appellant also submitted a partially-legible certificate of release or discharge from active duty.

⁴ 5 U.S.C. § 8128(a); *C.S.*, Docket No. 20-1075 (issued December 31, 2020); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁷ *J.J.*, Docket No. 19-0977 (issued December 31, 2020); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

decision was in error.⁸ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹³ The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁸ See 20 C.F.R. § 10.607(b); *W.J.*, Docket No. 20-0489 (issued December 21, 2020); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (September 2020).

¹² *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹³ *Supra* note 6 at Chapter 2.1602.4(b) (September 2020).

¹⁴ *J.J.*, *supra* note 7.

¹⁵ *Id.*

OWCP properly determined that appellant failed to file a timely request for reconsideration. As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁶ As appellant's request for reconsideration was not received into iFECS until March 24, 2020, more than one year after the issuance of OWCP's March 20, 2019 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP.¹⁷

The Board further finds that appellant has failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's cervical and lumbar spine conditions and the accepted August 21, 2018 employment incident.

In support of his untimely request for reconsideration, appellant submitted series of MRI scan reports of his cervical spine, right knee, right shoulder, and lumbosacral spine, dated August 15 through November 19, 2019. He also submitted a February 13, 2020 letter from the Department of Veterans Affairs and a DD Form 214 related to his honorable discharge from the Armed Forces. This evidence did not raise a substantial question as to the correctness of OWCP's denial of appellant's claim as it did not contain a rationalized medical opinion explaining how appellant's diagnosed conditions were causally related to the accepted August 21, 2018 employment incident. Evidence that is not pertinent to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹⁸

The Board has held that the term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted demonstrates on its face that OWCP committed an error in denying appellant's traumatic injury claim in its March 20, 2019 merit decision. The Board therefore finds that the evidence is insufficient to demonstrate clear evidence of error.¹⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ *Supra* note 5.

¹⁷ 20 C.F.R. § 10.607(b); *J.J.*, *supra* note 7.

¹⁸ *D.B.*, Docket No. 20-0466 (issued December 17, 2020); *S.E.*, Docket No. 16-1258 (issued December 5, 2016); *B.F.*, Docket No. 11-1181 (issued December 8, 2011).

¹⁹ *D.B.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board